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CHARLES ELMORE CROPLEY

In the Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 97 and 336

ANSEL HIGGINS,
Petitioner

v.

CARR BROTHERS COMPANY,
Respondent

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Petitioner

v.

JACKSONVILLE PAPER COMPANY,
Respondent

ON WRITS OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE AND TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR LEAVE TO FILE BRIEF AND BRIEF, AS AMICUS CURIAE, ON BEHALF OF AMERICAN RETAIL FEDERATION

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PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The undersigned respectfully petitions this Honorable Court for leave to file a brief as amicus curiae in the above-entitled cases. Counsel for all parties have assented in writing as indicated by letters filed with the clerk of this Court.

This application is made by the undersigned as counsel for American Retail Federation, Washington, D. C., members of which include 13 national and 28 state retail associations. A list of these members is attached hereto as Appendix A. The question involved in each of the cases is of direct interest to the members of the Federation.

Respectfully submitted,

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ON WRITS OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE AND TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF AMICUS CURIAE

PRELIMINARY STATEMENT

This brief is filed on behalf of the American Retail Federation. Most retailers serve a local community within a single state. A very large proportion of their merchandise comes from other states and very frequently retail stores use warehouses rather than space in the

stores for receipt of that merchandise and its storage before it is delivered to the stores for sale.

There is an apparent similarity between the duties of employees in a warehouse attached to a wholesale business and the duties of employees who work in a warehouse that functions as an integral part of a retail business. The Administrator of the Wage and Hour Division does not distinguish between these two classes of employees and seeks to apply indiscriminately to both, his notion that they occupy an intermediate, not terminal position in interstate commerce. (See Petition for Certiorari in *Walling* v. *Goldblatt Brothers, Inc.*, No. 418 Present Term, pp. 9-11). In our opinion the Administrator is in error. We take the view that the fundamental differences between a wholesale and retail business dwarf the apparent similarities between the duties of employees to the extent that rules determining the status of employees in a wholesaler's warehouse under the Fair Labor Standards Act can not automatically be applied to employees in a retailer's warehouse.

The two cases before the Court present the problem of determining the status of wholesale warehouse employees. Although we conceive that vital differences between wholesaling and retailing do not warrant rules evolved with respect to one being automatically applied to both, the Administrator nevertheless seeks to do so. In the present instance, however, and although the reverse is not true, if the Administrator's theory of coverage under the Fair Labor Standards Act is rejected as to wholesale warehouse employees, *a fortiori* on principle it can not be applied to retail warehouse employees. Accordingly, the issue raised in these cases is of direct interest to many of the retailers of this country.

Apart from their direct interest as retail business men, as citizens, the retailers are identified with a national interest, rooted in the present emergency, in favor of freezing wages rather than increasing the amount of

money in circulation.[a] We do not suggest that this national policy which aims to prevent inflation has anything to do with how the Fair Labor Standards Act should be interpreted. We do suggest that it puts into high relief any unwarranted attempt to expand the coverage of that Act in order to increase the amount of money paid to a particular class of employees.

OPINIONS BELOW

In *Higgins* v. *Carr Brothers Company*, No. 97, the opinion of the Supreme Judicial Court of Maine (R. 5-10) is not officially reported but appears in 25 A. (2d) 214.

In *Walling* v. *Jacksonville Paper Company*, No. 336, the opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 742-746) is reported in 128 F. (2d) 395.

JURISDICTION

In *Higgins* v. *Carr Brothers Company*, No. 97, certiorari was granted June 8, 1942. In *Walling* v. *Jacksonville Paper Company*, No. 336, certiorari was granted October 19, 1942. Jurisdiction is conferred, respectively, under Sections 237(b) and 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether employees in the warehouses of wholesale business enterprises are "engaged in commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act when the duties of such employees relate to the receipt, storing and distributing, within the state, of merchandise that comes from outside the state.

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[a] See Executive Order No. 9250 "Providing for the Stabilizing of the National Economy."
7 Fed. Reg. No. 196, 7871.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set forth in appendix "B" *infra* p. 39.

STATEMENT OF THE CASES

Higgins v. *Carr Brothers Company, No. 97*

Carr Brothers Company is a corporation operating a wholesale fruit, grocery and produce business in Portland, Maine. Its merchandise is purchased from local producers and also from dealers in other states. This merchandise is delivered into its warehouse by truck and rail and from there it is sold and delivered to the retail trade.

The petitioner was employed at the Carr Brothers Company warehouse. During the period of time now in dispute (January, 1939, to July, 1940) his duties were concerned with putting up orders, loading trucks and driving a light truck in the course of distributing orders. During that time none of the respondent's merchandise was sold or delivered outside of the State of Maine but Higgins worked more than forty hours a week and did not receive any overtime pay for the hours worked in excess of forty.

The Superior Court of Cumberland County in the State of Maine found the petitioner to be engaged "in commerce" for the ten weeks preceding the period of time now in dispute and made an appropriate award. That court held, however, that Higgins was not covered by the provisions of the Fair Labor Standards Act from January, 1939, to July, 1940. On appeal to the Supreme Judicial Court of Maine that judgment was affirmed.

Walling v. *Jacksonville Paper Company, No. 336*

The Jacksonville Paper Company is engaged in the wholesale distribution of paper and paper products in

the southeastern United States. It operates twelve branch warehouses: ten in Florida, one in Alabama and another in Georgia.

The Company does a large volume of business (R. 699). The merchandise in which it deals comes in large part from other states and foreign countries, arriving by rail, boat and truck. From its principal warehouse and five of the branch warehouses, merchandise is sold and distributed to customers in states other than those in which the warehouses are situated. It is conceded that employees in those warehouses are covered by the provisions of the Fair Labor Standards Act (R. 37, 38, 43, 44). From the seven remaining establishments merchandise is sold and delivered only in the states where the warehouses are located. (It is with reference to the employees in those seven establishments that this case is concerned.)

The usual procedure is to sell merchandise that is owned by the Company and stored in its warehouse (R. 412) and to deliver it to the customer. (R. 440, 303, 375, 460) Occasionally a sale is made of merchandise ordered by the Company but which has not yet arrived. In this event, when the merchandise is delivered to the Company (R. 453, 467, 614, 615) it is checked, and then forwarded, in whole or in part, to the customer. (R. 456) Less often an order is taken from a customer before the goods are purchased by the Company. When this occurs the goods are sometimes delivered directly to the customer without ever stopping to be deposited at the Company's warehouse. (R. 459) The petitioner filed a complaint against the Jacksonville Paper Company, alleging that all the employees in all of the warehouses were "engaged in commerce" within the meaning of the Fair Labor Standards Act (R. 5).

The District Court held that none of the respondent's employees in the said seven branch establishments were subject to the Act (R. 707-711). The Circuit Court of Appeals held the District Court Judge to have been in

error with respect to employees whose duties related to the unloading at destination of merchandise from sources outside the state, and to the purchase of goods to be sent across state lines to the Company. The Circuit Court also found error with respect to employees whose duties related to goods ordered by a customer before they were purchased by the Company.[b]

SUMMARY OF ARGUMENT

The lack of any Congressional intention to apply the Fair Labor Standards Act to employees of a local distributor is revealed by the operative phrases of coverage, the structure of the Act and the legislative objective. These sources combine to show the primary intent of Congress to regulate the wages and hours of employees working on goods in the states where they originate or are processed, of employees who handle the goods while they are arriving to their destination, but not of employees handling the goods after they have come to rest for delivery to the consignee. Such a construction is in line with legislative activity subsequent to the enactment of the statute concerning attempts to exclude the wholesale trades and with the well accepted canon that it is the Court's duty to adopt that of two possible constructions which will save and not destroy.

When merchandise is sent into a state where it is subsequently resold and distributed, the Fair Labor Standards Act does not regulate wages and hours of employees handling that merchandise after it has, as a practical matter, come to rest for the purpose of delivery to the consignee. The merchandise then becomes identified with a local stock in trade and the activities of employees with respect to it are not "in commerce". Whether such activities relate to unloading, receipt, storage, transfer, or distribution, they are essentially local. Analogies to

[b] We take no position in this brief with respect to employees whose duties are concerned with this kind of transaction.

cases decided under statutes that concern great national markets or currents of trade are legally inapposite. This is also true of attempts to apply authorities decided under statutes using broader operative phrases of coverage. The outstanding persuasive precedents for the determination of the scope of the words "in commerce" as used in this Act remain the National Industrial Recovery Act and the case of *Schechter Corp.* v. *United States*, 295 U. S. 495. By those precedents the scope of "in . . . commerce" is authoritatively defined and delimited so to exclude regulation of activities that relate to the handling of merchandise that has come to rest after an interstate journey.

ARGUMENT[1]

I.

The Scope of Sections 6 and 7 of the Fair Labor Standards Act Was Intentionally Restricted by Congress so as Not to Embrace Individuals Employed in Local Distributive Businesses.

Two classes of employees are covered by Sections 6 and 7 of the Fair Labor Standards Act: employees "engaged in commerce" or "engaged . . . in the production of goods for commerce". Even under the greatly expanded definition of "produced",[2] it is clear that there is no "production of goods" by such employees. We are therefore concerned solely with interpreting the former phrase.

The problem is to determine a definite boundary line "under a federal enactment between what it has taken

[1] Emphasis throughout this brief is ours.

[2] Section 1(j): "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

over for administration by the Central Government and what it has left to the States", *Kirschbaum* v. *Walling*, 316 U. S. 517; 62 S. Ct. 1116, 1118. The problem must be solved by measuring the scope that Congress intended to give to the words "engaged in commerce"[3] in Sections 6 and 7 of the Act. (See *United States* v. *American Trucking Association*, 310 U. S. 534, 542 and cases there cited in footnote 16.) We submit that any fair appraisal of the indicia of Congressional intention requires that the boundary line be drawn so as to exclude from coverage under the Fair Labor Standards Act the employees of a business which distributes for consumption or resale within a state, merchandise that comes from outside the state.

A. *The operative statutory words themselves and the structure of the Act demonstrate the Congressional intent not to regulate a local distribution of merchandise that has been received from other states.*

Although we are not here concerned with a determination of the scope of the second phrase of coverage, namely, "engaged . . . in the production of goods for commerce", nevertheless, its larger scope demonstrates the paramount concern of Congress with the regulation of hours and wages of employees handling goods in the states of origin and before those goods start an interstate journey.[4] *Warren-Bradshaw Drilling Co.* v. *Hall*, No. 21 Current Term, decided November 9, 1942. That provision, read in the light of the pertinent definitions

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[3]Section 1(b): " 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

[4]This paramount concern of Congress with conditions surrounding the "production" of goods that eventually travel across a state line is also shown by the prohibition in Section 15(a)(1) against the transportation as *shipment*, *delivery* or *sale* in interstate commerce of "unfair goods" and by Section 12 with respect to goods produced by oppressive child labor.

in Section 3, is stretched to the utmost[5] by sweeping within its coverage employees having any "necessary" connection with goods that eventually travel across a state line in commerce. Broad as it is, we submit that provision does not regulate conditions beyond those existing in the states where "goods" originate or are processed. The comparative position of the two operative phrases of coverage makes it clear that once goods start to move from those states, the task of carrying the benefits of the Act to other individuals falls upon the second operative phrase "in commerce".

These considerations reveal that Congress intended to regulate the wages and hours of work of employees handling goods before they start an interstate journey and while they are on an interstate journey, but not after they have finished their interstate journey. If it had been the intention of Congress to regulate the third as well as the first two stages, it could have easily been done by broadening the operative words of coverage. An examination of statutes enacted during recent years[6] makes

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[5] *United States* v. *Darby*, 312 U. S. 100. In speaking of the *Darby* case Mr. Justice Frankfurter has said "We had there to consider the full scope of the constitutional power of Congress under the Commerce Clause in relation to the subject matter of the Fair Labor Standards Act." *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 344, 355.

[6](a) Section 2(b) of the Packers and Stockyards Act, 42 Stat. 159, 160, U.S.C. Ti. 7, §183: "For the purpose of this Act . . . a transaction in respect of any article shall be considered to be in commerce if such article is part of that current of commerce" (whereby livestock and other goods) "are sent from one State with the expectation that they will end their transit, after purchase, in another, *including* . . . all cases where *purchase* or sale is either *for shipment to another State*, or for slaughter of livestock within the State and shipment outside the State of the products resulting from such slaughter . . ." See *Stafford* v. *Wallace*, 258 U. S. 495; *Tagg Bros. & Morehead* v. *United States*, 280 U. S. 420.

(b) Section 2(b) of the Grain Futures Act, 42 Stat. 998, 999 (now Commodity Exchange Act, 49 Stat. 1491, U.S.C. Ti. 7, §3) has practically the same coverage (including purchase for shipment) as the Packers and Stockyards Act. See *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1.

(c) Section 10(a) of the National Labor Relations Act, 49 Stat. 449, 450, 453, U.S.C. Ti. 29, §160(a) regulates unfair labor practices "*affecting* commerce", which term is defined in Section 2(7) to mean, in addition to "in commerce", "burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." Note was specifically made of the inclusiveness of this phrase in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 31.

it abundantly clear that Congress, when it so intends, knows how to reach activities in the state of destination by apt and inclusive words. "When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly." *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351.

A consideration of other statutes[7] that show no intent to exhaust the plentitude of Congressional power and, like

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(d) Section 1(i) of the Tobacco Inspection Act, 49 Stat. 731, U.S.C. Ti. 7, §511i, has practically the same coverage (including purchase for shipment) as the Packers and Stockyards Act. See *Currin* v. *Wallace*, 306 U. S. 1, 10-11.

(e) Section 4A of the National Bituminous Coal Conservation Act, 50 Stat. 72, 83, U.S.C. Ti. 15, §834, expressly includes "transactions in coal in intrastate commerce". See *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 393.

(f) The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246 (reënacting 49 Stat. 750, 753, §8c(1), U.S.C. Ti. 7, §608c (1), extends to "such handling" (of agricultural products) "as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce". See *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533; *United States* v. *Wrightwood Dairy Co.*, 62 Sup. Ct. 523.

(g) Section 301(a)(4) of the Agricultural Adjustment Act of 1938, 52 Stat. 31, 38, U.S.C. Ti. 7, §1301(a)(4) prescribes a scope substantially similar to that of the National Labor Relations Act.

(h) Section 1 of the Federal Employers' Liability Act, 35 Stat. 65, regulated carriers "engaging in commerce" with respect to employees injured while "in such commerce". The Act was broadened by Section 1 of the Act of August 11, 1939, 53 Stat. 1404, U.S.C. Ti. 45, §51, providing "Any employee . . . any part of whose duties . . . shall be the furtherance of . . . commerce, or shall, in any way directly or closely or substantially, affect such commerce . . . shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce . . ." The Senate Report (No. 661, 76th Cong., 1st Sess.) said: "This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be at the time of the injury, temporarily divorced therefrom and engaged in intrastate operations."

7(a) *Federal Employers Liability Act.* See *supra*, n. 6(h).

The decisions under this statute are voluminous. Many are conveniently collated in Schoene, L. P. and Watson, F., Workmen's Compensation on Interstate Railways, 47 Harvard Law Review, 389 (1934). These cases have repeatedly held that the Act applied only to employment so closely connected with interstate transportation as to be practically a part thereof. Of particular significance is the tendency of the Federal Employers Liability Act cases to narrow a statute, which, like the Fair Labor Standards Act, uses the phrase "in commerce" and the subsequent necessity for an amendment broadening that coverage by substituting the operative words of the 1939 amend-

this Act, limit the particular regulation involved to matters "in commerce" makes this statement doubly clear.

It cannot properly be argued that because the Act makes provision exempting the retail trades in Section 13(a)(1) and (2) that Congress has indicated its intent to include all other local distributive trades. The use of the maxim "exclusio unius, inclusio alterus" is not thus to be invoked. The reason is patently evident in the legislative history.[8]

B. *The expressed legislative objectives of the Fair Labor Standards Act reveal that Congress did not intend to regulate wages and hours of persons engaged in the local distribution of merchandise.*

The evil sought to be remedied by legislation is, of course, of fundamental importance in determining its meaning. *Holy Trinity Church* v. *United States,* 143 U. S. 457, 463. And the evil at which this statute was directed is made abundantly clear by the President's message, the witnesses before the Congressional committees, the Senate and House Reports, the debates and consideration of the bill in its various forms during the legislative process,

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ment in order to effectuate the Congressional intent to expand the scope of that Act.

(b) *Federal Trade Commission Act,* 17 38 Stat. 717, U.S.C. Ti. 15, §44. See: *Federal Trade Commission* v. *Bunte, Bros., supra.*

(c) *Motor Carrier Act,* 49 Stat. 543, U.S.C. Ti. 49, §301.

(d) *Cf. National Recovery Act,* 48 Stat. 195, U.S.C. Ti. 15, §703. Discussed in this brief, pp. 18, 19, *infra.*

[8]The "retailing capacity" and "retail establishment" exemptions provided in Section 13(a)(1) and (2) were not in the original bill, the language of which, the same as finally adopted, admittedly did not extend to retailers because of receipt of goods from interstate commerce. See *infra* pp. 15-18. The presence of these exemptions may thus not properly be made the basis of any inference with respect to the coverage intended for Sections 6 and 7. These exemptions are fully explained by (1) the interstate commerce which might be involved in the case of local retailers situated near a state line (see Sen. Rep. Vo. 884, p. 5, 75 Cong. 1st Sess.) and (2) an abundance of caution. The "retail establishment" exemption free from delimitation by the Administrator was inserted and adopted in the House on motion from the floor by Representative Celler at the instance of cautious retailers. (83 Cong. Rec. 7438.)

and finally, the Finding and Declaration of Policy in Section 2 of the final enactment. All sources combine to show that the Congressional purpose was to prevent the evils resulting from substandard labor conditions which, through the use of the channels of interstate commerce, spread from some states to others, but not to undertake the more ambitious and constitutionally questionable task of regulating conditions the effect of which was almost exclusively local. Accordingly, Congress undertook to regulate low wages and long hours in the states of origin of the goods and while the goods were on the interstate journey; these were matters beyond the legal and practical control of a single state and required federal legislation in order not only that they be eradicated but that the states be enabled to regulate local conditions which were within their effective control acting separately. It did not propose to regulate evils that might exist in the state of destination of goods from other states or where goods were produced and sold within a single state; in each case not only was federal action unnecessary but state legislation could cope more satisfactorily with the varying local problems involved.

The President, in his message,[9] recommended that only goods "produced" under conditions meeting minimum standards of free labor be "*admitted* to interstate commerce" and he expressed the hope, with respect to those labor conditions with which a State "may effectively deal without fear of unneighborly competition from sister States", that "the proposed Federal legislation should be a stimulus and not a hindrance to State action".

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[9]May 24, 1937. See Sen. Rep. No. 884 (75th Cong., 1st Sess.), p. 1; 81 Cong. Rec. 4960 and 4983.

The bills[10] to which the President referred, with a primary coverage[11] almost identical with that finally adopted, reveal the same purpose of the drafters. As is clear from a memorandum,[12] even to the judicial precedents cited for the various provisions of coverage[13] and the testimony before that Committee, the proposed legislation was "intended to catch the unfair labor practices at the point of production" so that "they must be fair goods if they move across the State line";[14] and it was to include production and transportation industries, but it did not extend to those engaged in "distribution and service".[15]

This purpose thus made clear at the outset is made even more explicit by the Committee Reports[16] and debate

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10 75th Cong., 1st Sess., S. 2475 and H.R. 7200, introduced May 24, 1937 in both Senate and House (Cong. Rec. 4961 and 4998).

11 The basic provisions covered "employees . . . engaged in interstate commerce or . . . in the production of goods which are sold or shipped to a substantial extent in interstate commerce". (See Secs. 2(a)(10)(11) and 4.)

The bill also included various supplementary provisions which allowed administrative action in particular cases of intrastate activities where interstate commerce was discriminated against or put at a competitive disadvantage or otherwise directly affected (Sections 8(a) and 10).

12 See Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H.R. 7200 (75th Cong., 1st Sess.), pp. 54-62.

13 Strikingly enough the precedents cited for regulating employees "engaged in commerce" were *Wilson* v. *New*, 243 U. S. 332; *Virginia Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515; *Washington, Va. & Md. Coach Co.* v. *N.L.R.B.*, 301 U. S. 142 (*Ibid.*, p. 59).

14 *Ibid.*, pp. 39-40.

15 *Ibid.*, p. 159.

16 The Bill, as reported out by the Senate Committee on July 8, 1937 (81 Cong. Rec. 6894) was, like the final Act, limited to employees "engaged in commerce or in the production of goods intended for" commerce (Secs. 4 and 7), with the single exception of the case where goods *produced and sold locally competed* with goods sold or transported in interstate commerce (Sec. 8(a)). The accompanying Report (Sen. Rep. No. 884, 75th Cong., 1st Sess.) states: "The bill carefully excludes from its scope business in the several States that is of a purely local nature. It applies only to the industrial and business activities of the Nation insofar as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce. It leaves to State and local communities their own responsibilities concerning those local service and other business trades that do not substantially influence the stream of interstate commerce" (p. 5).

in both Senate and House.[17] In the words of Senator Thomas explaining the bill finally agreed to in conference[18] and passed without change, "Both Houses obtained their common objective, which was to abolish traffic in interstate commerce . . . in the products of underpaid and overworked labor" (83 Cong. Rec. 9163).

This Congressional purpose received its final expression in the Finding and Declaration of Policy of Section 2. (Quoted *infra* p. 39) The Act is there expressly stated to be directed toward "*industries* engaged *in* commerce or *in the production of goods for* commerce"; and the five evil effects which are set forth indicate the intention to reach producers, shippers and carriers but not those who receive goods from interstate commerce.[19] The restricted purpose here in view is brought into high relief by comparison with the declarations of policy in earlier

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[17]The Chairman of the Senate Committee, introducing consideration of the Bill, pointedly said:

> "the bill is offered with the belief that it is impossible today to expect that any one local community can tend to bring about the proper regulation of the business of producing . . . goods to be scattered throughout the entire forty-eight States"

but that it had been the "prevailing" if not "unanimous" sentiment of the Committee that

> "business of a purely local type which serve a particular local community and which do not send their products into the streams of interstate commerce, can be better regulated by the laws of the communities and of the States in which the business units operate" (81 Cong. Rec. 7648).

During consideration in the House, after the bill had been passed by the Senate (July 31, 1937, 81 Cong. Rec. 7957) and reported out by the House Committee (August 6, 1937, 81 Cong. Rec. 8478) the Chairman of the House Committee, enumerated 23 States with minimum wage laws which had been studied by the Committee and said the bill left "local business" to "the protection of the laws of the several States". (82 Cong. Rec. 1392.)

[18]H. Rep. No. 2738, 75th Cong., 3d Sess. (83 Cong. Rec. 9158, 9246).

[19]In *United States* v. *Darby*, 312 U. S. 100, at 109, Chief Justice Stone said: "Its (the Act's) purposes, as we judicially know from the declaration of policy in s. 2(a) of the Act, and the reports of Congressional Committees proposing the legislation . . . is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several States". See also pp. 115, 122.

drafts of the bill and in the National Labor Relations Act.[20] In the original bill it was declared to be the purpose to eliminate substandard conditions "in and *directly affecting* interstate commerce"; the policy declared in the House bill which went to conference included the elimination of substandard conditions "in occupations in and *affecting* commerce". The National Labor Relations Act makes reference to "affecting . . . the flow of . . . manufactured or processed goods *from* or into the channels of commerce" and to "causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing *from* or into the channels of commerce".

As was made evident at every stage of the legislative process, therefore, the objective of Congress in enacting the present law plainly did not embrace the regulation of the wages and hours of work of employees at the place of destination where the goods are locally distributed. Their working conditions are of concern only to a single state and were appropriately left by Congress to the regulation of that state.

C. *The legislative history of the Fair Labor Standards Act shows the intent of Congress was not to regulate the wages and hours of individuals concerned with local distribution of goods received from other states.*

The legislative history of the Fair Labor Standards Act establishes that the adoption of a restricted coverage by the use of the words "in commerce" was deliberate. This fact has been acknowledged by this Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, 62 S. C. 1116, 1120, and there now appears to be no need to discuss in detail the various suggested changes preceding the final selection of the phrase "in commerce". However, the significance of such a deliberate selection is placed in striking relief

[20] 49 Stat. 449, §1, U.S.C. Ti. 29, §151.

when considered against the background of the judicial construction accorded the precise phrase as used in the National Recovery Act.[21] Particularly is this true in the light of the fact that the purpose of the Fair Labor Standards Act is a partial[22] and more modest realization of some of the aims of the N. R. A. which was struck down in *Schechter Corp.* v *United States*, 295 U. S. 495. Frequent reference to that case was made during the course of Congressional consideration of the bill resulting in the present act. And in enacting the present statute it was the stated intention of Congress to conform to its pronouncements.

In the *Schechter* case the defendants were wholesale slaughter house operators in New York. They bought live poultry (96% of which originated outside of New York) from commission men, a majority of whom were located in New York, many of whom were located in New Jersey and some of whom were located in Pennsylvania (295 U. S. at 520, lines 17-18 and 34-36). After the poultry was carried to the defendants markets in New York, it was sold, usually within twenty-four hours, to New York retail poultry dealers and New York butchers who sold to New York consumers. The Court considered whether the code regulation of wages and hours of work of the *Schechter* employees could be sustained under either of the statutory provisions of the N.R.A. One of these was whether the activities regulated by the codes were "in" commerce. With respect to that provision, Chief Justice Hughes said that when "the poultry was trucked to this slaughter house . . . for local disposition . . . the interstate transactions in relation to that poultry then ended . . . Neither the slaughtering nor the sales by defendants were transactions in interstate commerce" (p. 543). "The persons employed in slaughtering and

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21 48 Stat. 195, U.S.C. Ti. 15, §703.

22 The collective bargaining aspects of the N.R.A. were, of course, given permanent form in the National Labor Relations Act.

selling in local trade are not employed in interstate commerce." (p. 548) Mr. Justice Cardozo, with whom Mr. Justice Stone concurred, also pointed out that "There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere." (p. 554)

This was the authoritative and precise construction of the scope of the words "in commerce" that was considered by Congress before deliberately adopting those words in the present Act. In view of the similarity between the N.R.A. and the present statute of subject matter sought to be regulated and the repeated reference to the interpretation of that Act during Congressional consideration of the present legislation, it is clear beyond peradventure of doubt that Congress intended the words "in commerce" to have no broader scope than that which had been thus authoritatively prescribed.

It is true that since the passage of the Fair Labor Standards Act several unsuccessful attempts have been made to add amendments in order to secure exemption for certain wholesale and distributive businesses.[23] However, this fact offers no basis from which to infer the existence of an intent on the part of Congress to include within the scope of the Act as originally passed employees engaged in a *local* wholesale distributive business. All such amendments thus offered, together with one offered before the final passage,[24] sought to do more than to affect a *local* wholesale distribution within a single state. Each had a far greater scope. If enacted, the wholesalers af-

[23]See, for example: 84 Cong. Rec. 5474—Amendment offered by Representative Darrow having the effect of exempting from Section 7 an employee "in an establishment the principal business of which is wholesaling or distributing . . ."; 86 Cong. Rec. 5461, that part of the Borden bill seeking to amend Section 13 by exempting "any employee employed . . . in connection with or incidental to the wholesale distribution of goods by an employer, more than 50% of whose dollar sales . . . consisted of sales to retailers of agricultural food products"; 86 Cong. Rec. 5474, amendment to Section 13 offered by Representative Casey seeking to exempt "any employee employed in a bona fide wholesale establishment".

[24]See 83 Cong. Rec. 7421, an amendment offered by Representative Coffee seeking to exempt certain employees of wholesalers of agricultural commodities.

fected would have been exempt from the provisions of the Act even though their distribution involved interstate shipment of goods. All of the proposed amendments would have denied the benefits of the Act to wholesalers' employees even though the particular employer's business was entirely interstate.

D. *A reiteration of the Congressional intent not to regulate the wages and hours of employees engaged in local distribution of goods received from other states results from the application to the Fair Labor Standards Act of usual aids to statutory construction.*

(1) That Congress did not intend to regulate the wages and hours of employees handling goods at the end of an interstate journey and therefore the words "in commerce" should not be construed so as to include such regulation, appears from the application of a familiar canon of statutory construction. Referring to that canon which makes it the Court's duty to adopt the one of the two possible constructions which will save and not destroy, Chief Justice Hughes has said "We cannot attribute to Congress an intent to defy" the Constitution "or 'even to come so near doing so as to raise a serious question of constitutional law'." *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 351-352.

At the time the Fair Labor Standards Act was being considered and enacted *Schechter Corp.* v. *United States, supra*, stood like a beacon squarely holding that (p. 548) "the persons employed in slaughtering and selling in local trade are not employed in interstate commerce" and that (p. 550) an "attempt through the provisions of the code to fix the hours and wages of employees . . . in . . . intrastate business was not a valid exercise of federal power." It is still a beacon. We submit that the cases at bar are with respect to the *Schechter* case, *a fortiori* cases. Wholesale warehousemen here involved like the Schech-

ter Corporation buy goods of extrastate origin for intrastate sales. Some of those goods are sold to retailers sometimes within twenty-four hours. Unlike the poultry business of Schechter, by no means all of these goods are sold to retailers or consumers within a day and the warehousemen do not alter all of the goods by butchering or other processing.

The fact that poultry was slaughtered does not warrant a failure to apply the *Schechter* case to warehouses where no processing is done. The killing of the poultry is of no constitutional significance since slaughtering does not effect a current of commerce which would otherwise exist. *Stafford* v. *Wallace*, 258 U. S. 495, 498. The *Schechter* case cannot be validly distinguished on the ground that wholesale warehousemen are like the commission men in the *Schechter* case and that these commission men were inferentially assumed by the Chief Justice to be in interstate commerce. (Cf. Brief for the petitioner in *Walling* v. *Jacksonville Paper Company*, pp. 35-38) In the first place because much of Schechter's poultry was purchased from commission men in New Jersey or Pennsylvania and then trucked to the Schechter's slaughterhouse in what is clearly an interstate shipment. Secondly, because "commerce among the states is not a technical legal conception but a practical one, drawn from the course of business." (*Swift & Co. v. U. S.*, 196 U. S. 375, 398) and the poultry when sold by commission men was as a *practical* matter only partly through an interstate journey, whereas merchandise delivered to a wholesaler for subsequent intrastate resale and distribution is, as a *practical* matter, a part of the wholesaler's local stock in trade.

Apart from the authority of the *Schechter* case, there are general constitutional considerations which would render a construction of the words "in commerce" in Sections 6 or 7 of the Fair Labor Standards Act so as to include employees of a local wholesaler, at least a constitutionally questionable exercise of the commerce

power and therefore not to have been the construction contemplated by Congress.

Any attempted exercise of the commerce power is subject to the following principle:

> "The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system". *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 30.

That principle is not applied when employees of wholesale warehouses handling the distribution within a state of, for instance, fruit and produce or paper products are found to be engaged in interstate activities. This kind of local distribution is in no way comparable to the great nation-wide current of livestock,[25] grain,[26] steel,[27] tobacco,[28] milk,[29] and coal.[30] Unless the employees engaged in a local distribution work for wholesalers dealing in a kind of merchandise that is identified with a national market or a nation-wide current of traffic or trade, regulation of the wages and hours of such employees can be regarded as beyond the national commerce power. *Schechter Corp.* v. *United States*, 295 U. S. 495. The local distribution of paper products or fruit and produce can hardly be considered to be so enmeshed with predominantly interstate sales of the same products as to invoke the doctrine of *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, or the principle of the cases referred to in the last three footnotes.

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[25] *Stafford* v. *Wallace*, 258 U. S. 495; *Tagg Bros. & Morehead* v. *U. S.*, 280 U. S. 420.

[26] *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1.

[27] *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, *supra*.

[28] *Currin* v. *Wallace*, 306 U. S. 1; *Mulford* v. *Smith*, 307 U. S. 533.

[29] *U. S.* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 342.

[30] *Sunshine Anthracite Co.* v. *Adkins*, 310 U. S. 381.

(2) There is here no proper occasion to use a concurrent administrative interpretation of a statute as an aid to its judicial construction. Admittedly an interpretation by the Administrator of the Wage and Hour Division of the meaning to be given to the Fair Labor Standards Act is entitled to "great weight". *United States* v. *American Trucking Association, Inc.*, 310 U. S. 534, 549. In the present situation there has been no real assertion by the Administrator that the Act applies to employees of a wholesaler engaged in the local distribution of goods. This is apparent from an examination of paragraphs 14-16 of Interpretative Bulletin Number Five, issued by the Wage and Hour Division.[31] With the exception of the assertion that the Act applies to employees of a local wholesaler who are concerned with direct interstate ship-

[31] 1942 Wage and Hour Manual, p. 24.

The paragraphs to which reference is made appear as follows:

"14. The status of wholesalers has been a subject of frequent inquiry. Interpretative Bulletin No. 1 states that 'employees who are an essential part of the stream of interstate commerce are included in the phrase "engaged in commerce"; for example, employees of a warehouse whose storage facilities are used in the interstate distribution of goods.' Similarly, employees engaged in making sales at wholesale across State lines or in work incidental thereto are 'engaged in commerce.'

"15. Many wholesalers make all their sales within the State in which their places of business are located, but purchase the goods from outside the State. There are varying situations within this group of wholesalers selling locally. At times, shipment will be made direct to the customer of the wholesaler from the out-of-State manufacturer. Again, shipment may be made to the wholesaler after the goods have already been resold to or ordered by the customer. Employees engaged in connection with such sales are an essential part of the stream of interstate commerce and are included in the phrase 'engaged in commerce'.

"16. Again, there will be employees whose sole work is connected with goods sold from stock at the wholesaler's place of business. It is possible that a court may draw a distinction between employees engaged in connection with the sale of goods in the original package and employees engaged in connection with the sale of goods after the package has been broken. More likely, however, the courts will reject such a distinction and hold that employees employed in connection with the wholesale sale of goods brought in from outside the State are engaged in the stream of commerce and entitled to the benefits of the Act, whether or not the goods are sold in the original package. It is our opinion that wholesalers purchasing their goods from outside the State should comply with the provisions of the Act."

ments to a customer ordered by the wholesaler and the interstate shipment to the wholesaler following a specific prior order by the customer, the bulletin does not contain a positive assertion that the Act covers the employees of a wholesaler engaged in a local distribution. At most there is nothing but the weak statement of a doubtful conclusion appearing in the last sentence of paragraph sixteen prefaced by two statements well within the realm of fancy and conjecture. Moreover, the interpretations of the Wage and Hour Division concerning the application of the Act to local wholesale warehouse employees have not been consistent.[32]

We therefore submit that by every relevant criterion it was the intention of Congress to restrict the scope of Sections 6 and 7 of the Fair Labor Standards Act so as not to include individuals whose duties relate to the distribution of merchandise that takes place within a state and, the language which Congress deliberately chose is precisely fitted to carry out that intention and to deny such a coverage to the Act.

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[32]The following is part of the Wage and Hour Division Field Instructions, June 4, 1942 (¶33,159, C.C.H. Labor Law Service) and concerns coverage of certain industries under Section 12(a) of the Act.

a. Wholesale Establishments and Warehouses

"The determination of coverage of such establishments should be covered by the following principles:

"*Wholesale establishments and warehouses distributing all of their goods within the State.* It is believed doubtful that a shipment or delivery for shipment in commerce takes place within the meaning of section 12(a) of the Act where a wholesale establishment or warehouse neither ships goods directly across State lines nor delivers goods for shipment across State lines. Deliveries of goods from establishments of this type which employ minors should not be considered a violation of section 12(a)."

II.

Merchandise from Out of the State, Consigned to a Wholesaler Distributing within a State, Ceases to be in Interstate Commerce When it Comes to Rest for the Purpose of Being Delivered to the Consignee with the Result That Thereafter the Wages and Hours of Employees Whose Duties Relate to Unloading, Receipt, Storage and Distribution of Such Merchandise Are Not Subject to Regulation by the Fair Labor Standards Act.

The test of coverage under Sections 6 and 7 relates to the nature of the employment of the particular employee. (*Kirschbaum* v. *Walling*, 316 U. S. 517, 62 S. Ct. 1116, 1120, *Warren-Bradshaw Drilling Co.* v. *Hall*, No. 21 Current Term, Decided November 21, 1942.) In every case, therefore, the specific problem becomes one of determining whether a particular employee's activities are such as to include him within the boundary line that marks the division between what has been taken over for administration by the Federal Government and what has been left to the states. (See *Kirschbaum* v. *Walling* and *Warren-Bradshaw Drilling Co.* v. *Hall, supra.*)

As we have indicated in Point I of this brief, the clear intent of Congress was not to apply Sections 6 and 7 of the Act to individuals employed in a local distributive business. The *Schechter* case, which alone involved a regulation like that here presented and which presents a similar factual situation, requires the same conclusion.

It has, moreover, long been familiar law that interstate commerce ends upon the receipt of goods from out of state for the purpose of local storage, sale or other disposition and that any further dealings with such goods are in the field of intrastate commerce. Many decisions under Federal statutes with language like that used

here,"[33] in addition to the *Schechter* case, make this clear. The same is true with respect to other cases that decide, for purposes of taxes or regulations by a state, that goods held for local disposition in the state of destination are no longer in interstate commerce.[34] Thus, it was stated in *Liggett & Co.* v. *Lee*, 288 U. S. 517, at 539,

> "A tax on the value of merchandise in a retail store, or warehoused . . . for sale in that store, even though incident on articles which have moved in interstate commerce is laid after interstate commerce has ceased."

So, too, even where there is an uninterrupted flow of oil from outside the state through seaboard storage tanks to other storage tanks in various parts of the state in which it is subsequently distributed to customers,

> "It seems very clear . . . on a broad view of the facts that the interstate or foreign commerce in all

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[33] See *supra*, p. 12, n. 7.

The Federal Employers' Liability Act, with its restricted scope prior to 1939, it is well settled, applied only to employees so closely connected with interstate transportation as to be practically a part thereof. *E.g.*, *Shanks* v. *Delaware, L. & W. R. R.*, 239 U. S. 556; *N. Y., N. H. & H. R. R.* v. *Bezue*, 284 U. S. 415. It did not apply to a maintenance man responsible for heating a depot, baggage room, rooms used for general railroad purposes, coaches and a turntable. *Chicago & Northwestern Ry.* v. *Bolle*, 284 U. S. 74.

The Federal Trade Commission Act has been held not to apply to local distribution of extrastate goods. For example, "The claim that they are engaged in interstate commerce rests wholly on the fact that the commodities in which they deal are in large part transported into Virginia from other states in which they are procured. But this *transportation* ends when the goods reach their destination and are placed in petitioners' warehouses in Norfolk and Newport News." *Winslow* v. *Federal Trade Commission*, 277 Fed. 206, 209 (C.C.A. 4th) *cert. den.* 258 U. S. 618. See also *Ward Baking Co.* v. *Federal Trade Commission*, 264 Fed. 330 (C.C.A. 2d).

The Motor Carrier Act has consistently been denied application to distribution within a state of goods received from out of state. *E.g.*, *R. L. Surles Contract Carrier Application*, 4 M.C.C. 488 (1938); *William V. Kelly Contract Carrier Application*, 7 M.C.C. 315 (1938).

[34] *E.g.*, *Brown* v. *Houston*, 114 U. S. 622; *Pittsburg & Southern Coal Co.* v. *Bates*, 156 U. S. 577; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500; *General Oil Co.* v. *Crain*, 209 U. S. 211; *Chicago, M. & St. P. Ry.* v. *Iowa*, 233 U. S. 334, 343-344; *Public Utilities Comm.* v. *Landon*, 249 U. S. 236; *Kansas City Structural Steel Co.* v. *Arkansas*, 269 U. S. 148; *Atlantic Coast Line R. R.* v. *Standard Oil Co.*, 275 U. S. 257, 267-270; *East Ohio Gas Co.* v. *Tax Comm.*, 283 U. S. 465, 471; *Liggett & Co., Inc.* v. *Lee*, 288 U. S. 517, 539, 545; *Lipson* v. *Socony Vacuum Co.*, 87 F.(2d) 265, 267 (C.C.A. 1st).

> this oil *ends on its delivery* . . . into the storage tanks or the storage tank cars at the seaboard, and that from there its distribution to storage tanks, tank cars and bulk stations and drive-in stations, or directly by tank wagons to customers, is all intrastate commerce." *Atlantic Coast Line R.R.* v. *Standard Oil Co.*, 275 U. S. 257, 267.

Thus far, the almost unanimous disposition of courts deciding cases under the Fair Labor Standards Act has been to apply these principles and hence to rule that employees whose duties relate to the local storage and distribution of goods received from other states are engaged in intrastate commerce and therefore not within the scope of Sections 6 and 7. Such cases[35] have involved local wholesale and retail branch warehouses of foreign manufacturers and national chain stores, warehouses of local retailers as well as warehouses of local wholesalers. We submit these cases reach the correct result as to such employees. Against this overwhelming weight of authority there are but two District Court cases[36] that adopt a contrary view. We believe these two cases rest on the evident and basic fallacy of attempting to give to the words "in commerce" a scope far beyond that which Congress intended to give.

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[35] *Jewel Tea Co.* v. *Williams*, 118 F.(2d) 202 (C.C.A. 6th); *Jax Beer Co.* v. *Redfern*, 124 F.(2d) 172 (C.C.A. 5th); *Swift & Co.* v. *Wilkerson*, 124 F.(2d) 176 (C.C.A. 5th); *Walling* v. *Goldblatt Bros.*, 128 F.(2d) 778 (C.C.A. 7th); *Walling* v. *Jacksonville Paper Co.*, 128 F.(2d) 395 (C.C.A. 5th); *Gerdert* v. *Certified Poultry & Egg Co., Inc.*, 38 F. Supp. 964 (S.D. Fla.); *Veasey Drug Co.* v. *Fleming*, 42 F. Supp. 964 (W.D. Okla.); *Rauhoff* v. *Gramling & Co.*, 42 F. Supp. 754 (E.D. Ark.); *Duncan* v. *Montgomery Ward & Co.*, 42 F. Supp. 879 (S.D. Tex.); *Eddings* v. *Southern Dairies*, 42 F. Supp. 664 (E.D. So. Car.); *Jehs* v. *Singer Sewing Machine Co.*, 1 W.H. Cases 814; *5 Labor Cases* 62,255 (N.D. Okla.); *Moses* v. *McKesson & Robbins, Inc.*, 44 F. Supp. 528 (S.D. Tex.); *Fleming* v. *American Stores, Inc.*, 42 F. Supp. 511, 524 (E.D. Pa.); *Rivera* v. *Central Aguirre Sugar Co.*, 1 W.H. Cases, 577, *4 Labor Cases* 61,539 (D. P. Rico); *Walling* v. *Mutual Wholesale & Supply Co.*, 5 W. & H. Rep. 730; *6 Labor Cases*, Par. 61,228 (D.C. Minn.); *Walling* v. *Silver Bros. Inc.*, 5 W. & H. Rep. 533 (D.C. N.H.); *6 Labor Cases*, Par. 61,042; *Brown* v. *Bailey*, 177 Tenn. 147 S.W. (2d) 105; *Higgins* v. *Carr Bros. Co.*, 25 A. (2d) 214 (Maine).

[36] *Gavril* v. *Kraft Cheese Co.*, 42 F. Supp. 702 (N.D. Ill.); *Fleming* v. *Alterman*, 38 F. Supp. 94 (N.D. Ga.).

Authorities decided under other statutes in which Congress has "conveyed its purpose explicitly" (*Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351) to regulate certain local activities have no probative force as to the scope intended for this Act. Thus, decisions[37] under the "affecting commerce" statutes[38] are inapposite.[39] Similarly inappropriate are decisions under the "current of commerce" statutes.[40] Congress intentionally refrained from giving such broad coverage to this Act when it used the words "in commerce". Consequently, decisions like *Stafford* v. *Wallace*, 258 U. S. 495 (Packers & Stockyards Act), *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1 (Grain Futures Act) and *Currin* v. *Wallace*, 306 U. S. 1 (Tobacco Inspection Act) are not only distinguishable but plainly "cannot be cited to show what is interstate and what is intrastate commerce". *Atlantic Coast Line R.R.* v. *Standard Oil Co.*, 275 U. S. 257, 273. See also *Schechter Corp.* v. *United States*, 295 U. S. 495, 543.

There is no similarity except in the remotest degree between the funnel of commerce involved in great national markets through which livestock,[41] grains[42] and tobacco[43] move and the local distributive operation through which fruit and produce reach the ultimate retailer in Portland, Maine, or through which paper products reach the ulti-

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[37]See, for instance, *N.L.R.B.* v. *Fainblatt*, 306 U. S. 601 (National Labor Relations Act) and *Mulford* v. *Smith*, 307 U. S. 38 (Agricultural Adjustment Act of 1938). These authorities are relied on in the *Alterman* case (n. 36 *supra*) 38 F. Supp. at 100. It also relies on *Currin* v. *Wallace* under a "current of commerce" statute, 38 F. Supp. at 100.

[38]See *supra* pp. 11, 12, n. 6(c), (d), (f) and (g).

[39]This fact has been recognized in some of the lower court decisions cited in n. 34, *supra* (See, *e.g.*, *Jax Beer Co.* v. *Redfern*, 124 F.(2d) 172 (C.C.A. 5th); *Jewel Tea Co.* v. *Williams*, 118 F.(2d) 202, 206 (C.C.A. 10th); *Gerdert* v. *Certified Poultry & Egg Co., Inc.*, 38 F. Supp. 964, 968-969 (S.D. Fla.); *Veasey Drug Co.* v. *Fleming*, 42 F. Supp. 689, 695 (W.D. Okla.); *Eddings* v. *Southern Dairies*, 42 F. Supp. 664, 667 (E.D. So. Car.).

[40]See *supra* p. 11, n. 6(a) and (b).

[41]*Stafford* v. *Wallace*, *supra*.

[42]*Chicago Board of Trade*, *supra*.

[43]*Mulford* v. *Smith*, *supra*.

mate consumer in those parts of Florida where customers of the Jacksonville Paper Company happen to do business. Whatever "current" or "flow" of goods purchased out of the state that exists in such an operation, stops when those goods come to rest for the purpose of being "delivered" and used in the businesses of such local wholesale distributors.

The rate at which a local wholesale distributor turns over the goods in his stock is not determinative of the existence of interstate commerce. That rate varies among different distributors and among different goods carried by the same distributor, depending on local conditions, the nature of the merchandise, the season, the efficiency of operation, general business conditions and other conditions peculiar to a particular enterprise."[44] The essential fact is that once the goods arrive at their destination, they are a part of the distributor's stock in trade. If that trade is within a state, interstate commerce is then over. Such operations afford no warrant for drawing unrealistic metaphors or analogies with respect to a "current" or "flow" of interstate commerce.

> "The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and become commingled with the mass of property within the State and is there held solely for local disposition and use" (*Schechter Corp.* v. *U. S.*, 295 U. S. 495, 453).

Related to some extent to the rate at which a local wholesale distributor turns over his stock is the ability of that distributor to predict accurately the future demands of his customers. The extent to which this is well done, whether by guess or by meticulous analysis of statistical data, and correlated with appropriate action with reference market conditions affecting the supply of goods, measures the success of the business.

[44]Beckman and Engle, Wholesaling, Principles and Practice (1937), p. 356.

This is of the essence of merchandising. It is apparent without need of elaboration that the fact that a wholesale distributor successfully anticipates the needs of his local customers, particularly or generally, and then secures a stock of goods to meet their needs, has no relation whatsoever to whether employees handling those goods are in interstate commerce after the goods are "delivered" to the wholesaler.[45]

There is no similarity between the factually and legally inapposite situations existing in anti-trust cases, such as *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291[46] and *Federal Trade Commission* v. *Pacific States Paper Trade Ass'n.*, 273 U. S. 52,[47] (*Cf.* Brief for the petitioner in *Walling* v. *Jacksonville Paper Company*, pp. 30-35) Moreover, such decisions are not pertinent to what is in interstate commerce since conspiracies to restrain inter-

[45]The brief for the petitioner in *Walling* v. *Jacksonville Paper Company* (p. 28) concedes that an unanticipated local sale from stock would not place employees handling the merchandise "in commerce".

Apparently, however, such employees would *get* into interstate commerce, not by changing their work in any respect, but simply and solely by having the customer continue to order until the time arrives when the employer could reasonably anticipate the re-order. Presumptively, when that time arrived in any given case would be a nice question of fact for the jury.

The absurdity of the view taken in the Government's brief (pp. 25-29) becomes apparent when it is realized that a wholesaler who buys a stock of goods and goes into a local distributive business is not, according to the admission (p. 28), engaged in interstate commerce. Yet under the theory advanced by the Government such a wholesaler becomes engaged in interstate commerce as soon as a *regular* clientele is established.

[46]The *Binderup* case involved a combination by New York distributors of motion picture films and their Omaha agents. Pursuant to prior contracts between a Nebraska exhibitor and the New York distributors, films were sent to the Omaha agents "not as a consummation of the transit but for delivery to the" exhibitor. (*Industrial Assn.* v. *United States*, 268 U. S. 64, 79. Such agents are like the commission men in the *Schechter* case and unlike a local wholesaler distributor.

[47]The *Pacific States* case involved combinations of wholesalers fixing prices they would charge local retailers for goods. The course of business was that pursuant to orders received from manufacturers in other states who either delivered direct to the local retailers or to the wholesalers for the retailers. Accordingly, contrary to the case of a local wholesale distributor, the wholesalers in that case were holding goods subject to the disposition previously made by the agreements. Furthermore the nature and purpose of the handling by such wholesalers, like the agents in the *Binderup* case, differ entirely from the nature and purpose of a wholesaler's local handling for local distribution for subsequent resale or consumption.

state commerce are "none the less within the reach of the Anti-Trust Act, because the conspirators seek to restrain their end by means of intrastate activities". *Schechter Corp.* v. *U. S., supra at* 544. See also *United States* v. *Darby*, 312 U. S. 100, 122; *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 62 S. Ct. 523, 526.

We submit that employees of a local wholesale business whose activities are concerned with the storage and distribution of goods received from other states are clearly engaged in intrastate commerce and that the almost unanimous body of decisions[48] that now exists and holds such employees not to be within the scope of Sections 6 and 7 expresses the correct view. We feel that the result of those decisions is within the principles which should control the placing of the boundary line between what has been "taken over for administration by the central government" under the Fair Labor Standards Act and what that Act "as left to the states" (See *Kirschbaum* v. *Walling*, 316 U. S. 517, 62 S. Ct. 1116, 1118).

There is, however, no such unanimity[49] among decisions rendered up to this time with respect to whether the principles we have discussed also require that employees whose duties in a local distributive business relate to the unloading or receipt of goods from other states, be excluded from the provisions of Sections 6 and 7. Most of the cases have drawn the boundary line between coverage and non-coverage along the edge of the unloading platform at the distributor's warehouse.[50] Two cases go further and take the view that all employees who perform any work "in connection with incoming goods" as "ap-

[48] See cases cited *supra* p. 27, n. 35.

[49] See, for instance, cases involving employees unloading goods at freight terminals: *Gerdert* v. *Certified Poultry & Egg Co., Inc.*, 38 F. Supp. 964 (S.D. Fla.); *Veazey Drug Co.* v. *Fleming*, 42 F. Supp. 689 (W.D. Okla.); *Rauhoff* v. *Gremling & Co.*, 42 F. Supp. 754 (E.D. Ark.); *compare: Super-Cold Southwest Co.* v. *McBride*, 124 F.(2d) 90 (C.C.A. 5th); *Klois* v. *Ippolito*, 40 F. Supp. 187 (W.D. Tenn.).

[50] *E.g., Walling* v. *Goldblatt Bros.*, 128 F.(2d) 778 (C.C.A. 7th); *Jax Beer Co.* v. *Redfern*, 124 F.(2d) 172 (C.C.A. 5th). See also cases cited *supra* p. 27, n. 35. Compare the cases cited in n. 36.

propriate or necessary to the furtherance of" purchase and receipt of such goods are covered.[51]

We submit the correct view to be that the facts of the particular situation relative to when and where, as a practical matter, goods come to rest and consequently are "delivered" to a consignee for resale or distribution within the state of destination determine whether employees whose duties relate to the receipt and unloading of those goods are covered by the Act rather than the mechanical determination that results from drawing a line between coverage and non-coverage at a local distributor's unloading platform. We believe this to be the proper application to the present problem of the statement of Mr. Justice Holmes that "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business". *Swift & Co.* v. *United States*, 196 U. S. 395, 398. To be sure, under the view which we urge, in some instances (as for example where several packages are brought to the platform by an express truck) an unloading platform will prove to be the place where goods from other states come to rest

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[51] *Fleming* v. *American Stores Co.*, 42 F. Supp. 511 (E.D. Pa.); *Drake* v. *Hirsch*, 40 F. Supp. 290, 294 (N.D. Ga.).

Even if cases drawing the line at the unloading platform are assumed to be correct, these two cases cannot be supported. The question is not whether the employee in question performs duties "necessary to" or "in connection with" carrying on interstate commerce, but whether they are "in" such commerce. Employees who perform various clerical functions, such as checking or inventorying, in connection with incoming goods are no more engaged "in" interstate commerce than the employee in *Chicago & Northwestern Ry.* v. *Bolle*, 284 U. S. 74, who heated the depot, baggage room, a room used for general railroad purposes, coaches and a turntable. And, even on the broadest view of "interstate commerce", the duties of employees who handle or otherwise deal with the goods after they have been unloaded onto the warehouse platform arise only *after* the interstate journey has ended. Congress has shown it knows how to provide for the result which these two cases have legislated when it wants to, not only in the 1939 amendment to the Federal Employers' Liability Act (see *supra*, p. 12, n. 6(h)), but in this very Act itself by expressly providing that the "*production of goods for commerce*" shall include any process or occupation "necessary" thereto (see *supra*, p. 9, n. 2). These cases rest on the evident misapprehension that that provision is by some process of analogy to be transposed to the coverage of employees engaging "in commerce". See *Drake* v. *Hirsch*, 40 F. Supp. 290, at 294, using similar language and citing the *Darby* case, 312 U. S. 100. The view taken by them is untenable for the very reason that Congress gave such a definition in the case of employees engaged in *production*, but not otherwise.

and consequently are "delivered" to the consignee but this would not warrant the application of that result to other situations arising on different facts. (An example of the latter situation would be where a load of merchandise is hauled into the state by a tractor-trailer unit and where, instead of backing up to the consignee's platform and unloading, the tractor is uncoupled and driven away, leaving the loaded trailer on the consignee's premises but some distance away from the platform. Under such circumstances it is not our belief that employees of the consignee should be considered to be "in commerce" simply because they unload the merchandise from the trailer and carry it to the loading platform.)

The *Schechter* case is directly in point. When the poultry "was trucked to their slaughter house in Brooklyn for local distribution", whether from New York, New Jersey or Pennsylvania "the interstate transactions in relation to that poultry then ended" (295 U. S. at 543). Since the interstate movement of goods ends on delivery to the consignee, a local wholesale distributor's employees unloading the goods after delivery are not within the scope of Sections 6 and 7 of the Act. Moreover, this result is expected when the operative words of coverage in those sections are explained by the legislative history and given a construction consonant with the "aim and purpose" of the statute. Those operative words, it must be remembered, are not in a statute that seeks to regulate interstate transactions as to price, trade practices or transportation, but in a statute that seeks the regulation of wages and hours of employees. And it cannot properly be held, we believe, that Congress intended the regulation of such a local matter as the wages and hours of employees whose only connection with the actual interstate commerce was unloading merchandise which had come from another

state.[32] The courts that have held these employees covered by this Act have done so for the reason that in considering *who* was covered, they have failed to consider whether, in view of *what* was being regulated, Congress intended to apply the Act to the particular individual involved.

Cases such as *Baltimore & O. S. W. R. R.* v. *Burtch*, 263 U. S. 250, 544; *Puget Sound Stevedoring Co.* v. *State Tax Comm.*, 302 U. S. 90, 92[33] are not in point since the unloading in each case was by or for the carrier before delivery to the consignee. Nor are other cases that involve statutes expressly covering services (performed by others than the consignee) which admittedly were outside "transportation" but recognized that the determinative fact is not unloading but delivery to the consignee. See *Union Stock Yards & Transit Co.* v. *United States*, 308 U. S. 213, 218-221; *Erie R. R.* v. *Shuart*, 250 U. S. 465, 467, 468; *Southern Railroad* v. *Prescott*, 240 U. S. 637-639; *Cleveland St. L. Ry.* v. *Dettlebock*, 239 U. S. 588, 593-594. (Cf. Brief for petitioner in *Higgins* v. *Carr Brothers Co.*, pp. 22, 23)

To sweep indiscriminately all employees of a local distributor whose duties relate to unloading and receipt of goods from other states within the coverage of this Act is failing to recognize the essential principle that determination of the scope of this Act presents a unique problem and that its words "derive vitality from the aim and nature of the specific legislation" involved. *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351. We reiterate the operative words of this Act are "in commerce", not "in the current of commerce", "affecting commerce", or some other similar phrases of

[32] By the same token, it was not, we submit, the intention of Congress to regulate the wages and hours of an individual who is connected with ordering such merchandise since such an employee's only connection with interstate commerce is before the merchandise starts to come from another state. *Cf. Walling* v. *Goldblatt*, 128 F.(2d) 778 (C.C.A. 7th); *Eddings* v. *Southern Dairies*, 49 F. Supp. 664 (E.D. Car.).

[33] See Brief for petitioner in *Higgins* v. *Carr Brothers*, pp. 21, 22, 23.

broader scope. The legislation regulates wages and hours of employees, not transactions in a national commodity market, or combinations in restraint of trade, or trade practices, or prices at which goods may be bought or sold. There are only two earlier instances, apart from transportation industries, of earlier Federal statutes which involve regulation under the commerce clause of relations between employer and employee. One is the National Recovery Act and the other the Labor Relations Act, which, like the present statute, stems from the former enactment. The scope of the latter serves as no precedent in determining the activities of what employees are "in commerce" because that statute was expressly given a scope ("affecting commerce") which was deliberately denied to the Fair Labor Standards Act.

The National Recovery Act, with the *Schechter* decision, delimiting the scope of "in commerce" as used in it, remain as the outstanding persuasive precedents for the determination of the questions to be decided here. If to those precedents be added the fact that the pronouncements in the *Schechter* case as to the scope of the phrase "in" comme... was consciously adopted by Congress as a pattern in enacting the present coverage, together with the implication carried by the legislative history relative to the scope intended for the words "in commerce", it becomes plain that employees of a local wholesale distributor are not within Sections 6 and 7 of the Fair Labor Standards Act when the duties of such employees relate to goods from other states which have, as a practical matter, come to rest for the purpose of being "delivered" to their employer and thus become a part of a local stock in trade.

III.

CONCLUSIONS

The judgment of the Supreme Judicial Court of Maine in the case of *Ansel Higgins* v. *Carr Brothers Company*, No. 97, should be affirmed.

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Walling* v. *Jacksonville Paper Company*, No. 336, should be reversed insofar as it seeks to apply the Act to employees whose duties relate to the ordering of goods to be later shipped and to the unloading of goods that have as a practical matter come to rest and been "delivered"; in other respects that judgment should be affirmed.

Respectfully submitted,

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November, 1942.

APPENDIX A

American Retail Federation

MEMBER ASSOCIATIONS

Thirteen National Associations

American National Retail *Jewelers* Association
Cooperative *Food* Distributors of America
Mail Order Association of America
National Association of Chain *Drug* Stores
National Association of *Food* Chains
National Association of Retail *Grocers*
National *Automobile* Dealers Association
National Retail *Dry Goods* Association
National Retail *Farm Equipment* Association
National Retail *Furniture* Association
National Retail *Hardware* Association
National *Shoe* Retailers Association
National *Voluntary Groups* Institute

Twenty-Eight State Associations

California Retailers Association
Colorado Retailers Association
Delaware Retailers' Council
Florida Merchants Association, Inc.
Georgia Mercantile Association
Illinois Federation of Retail Associations
Associated Retailers of *Indiana*
Associated Retailers of *Iowa*, Inc.
Kentucky Merchants Association
State Merchants Association, Inc. (*Maine*)
Maryland Council of Retail Merchants

Massachusetts Council of Retail Merchants
Michigan Retail Institute
Missouri Retailers Association
Nevada Retail Merchants Association
New Hampshire Council of Retail Merchants
Retail Merchants Association of *New Jersey*
New York State Council of Retail Merchants
North Carolina Merchants Association
Ohio State Council of Retail Merchants
Oklahoma Retail Merchants Association
Pennsylvania Retailers' Association
Rhode Island Retail Association
Retail Merchants Association of *Tennessee*
Retail Merchants Association of *Texas*
Utah State Retailers' Association
Vermont Council of Retail Merchants
Retail Merchants Association of *Virginia*

APPENDIX B

Fair Labor Standards Act. c. 676, 52 Stat. 1060 (29 U.S.C., Sec. 201, et seq.).

Section 2 (a). The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

SECTION 3. As used in this Act— . . .

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufactur-

ing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Section 6 (a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates . . .

Section 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce . . .

Section 13 (a). The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; . . .

SUPREME COURT OF THE UNITED STATES.

No. 97.—October Term, 1942.

Ansel Higgins, Petitioner, vs. Carr Brothers Company.	On Writ of Certiorari to the Supreme Judicial Court of the State of Maine.

[January 18, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

This is a companion case to *Walling* v. *Jacksonville Paper Co.*, decided today, and is here on certiorari to the Supreme Judicial Court of Maine. Higgins claims minimum wages and overtime compensation alleged to be due him under §§ 6(a) and 7(a) of the Fair Labor Standards Act between January 1939 and July 1940. Prior to that time respondent, which conducts a wholesale fruit, grocery and produce business in Portland, Maine, had been selling and delivering its merchandise not only to the local trade in Maine but also to retailers in New Hampshire. For the period here in question the New Hampshire trade had been discontinued and all sales and deliveries were solely to retailers in Maine. The only additional facts which we know about respondent's course of business are accurately summarized in the following excerpt from the opinion of the Supreme Judicial Court: "It buys its merchandise from local producers and from dealers in other states, has it delivered by truck and rail, unloaded into its store and warehouse and from there sells and distributes it to the retail trade. While some of the produce and fruit is processed, much of it is sold in the condition in which it is received. The corporation owns all of its merchandise and makes its own deliveries. It makes no sales on commission nor on order with shipments direct from the dealer or producer to the retail purchaser." Higgins' employment involved work as night shipper putting up orders and loading trucks for delivery to retail dealers in Maine or driving a truck distributing merchandise to the local trade.

Petitioner in his brief describes the business in somewhat greater detail and seeks to show an actual or practical continuity of movement of merchandise from without the state to respondent's regular

customers within the state. But here, unlike *Walling* v. *Jacksonville Paper Co.*, there is nothing in the record before us to support those statements nor to impeach the accuracy of the conclusion of the Supreme Judicial Court of Maine that, when the merchandise coming from without the state was unloaded at respondent's place of business its "interstate movement had ended." Some effort is made to show that the court below applied an incorrect rule of law in the sense that it gave the Act too narrow a construction. In that connection it is argued that respondent is in competition with wholesalers doing an interstate business and that it can by underselling affect those businesses and their interstate activities. As we indicated in *Walling* v. *Jacksonville Paper Co.*, that argument would be relevant if this Act had followed the pattern of other federal legislation such as the National Labor Relations Act (see 29 U. S. C. § 152(7), § 160(a)) and extended federal control to business "affecting commerce". But as we pointed out in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, this Act did not go so far but was more narrowly confined.

Thus petitioner has not maintained the burden of showing error in the judgment which he asks us to set aside.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.